

IN THE
Supreme Court of the United States

OCTOBER TERM, 1990

THE STATE OF NEW YORK, THE CITY OF NEW YORK, THE NEW
YORK CITY HEALTH AND HOSPITALS CORP.,

Petitioners,

vs.

DR. LOUIS SULLIVAN, or his successor, SECRETARY OF THE UNITED
STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

I. THE REGULATIONS EXCEED HHS' STATUTORY AUTHORITY AND ARE ARBITRARY AND CAPRICIOUS

A. The Standards Of Deference Set Forth In *Chevron* Do Not Apply To The Secretary's Regulations

Respondent asserts that the standards of deference articulated in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), govern this case, requiring the Court to uphold the regulations unless they conflict with a clearly expressed intention of Congress on the precise question at issue or are otherwise inconsistent with Title X. Resp. Br. 33. Although the regulations must be rejected even under *Chevron*, *see infra* Points I(B) & (C), those standards do not govern this case.

It is well-settled that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council*, 485 U.S. 568, 575 (1988). When an interpretation of a statute poses a "significant risk" of unconstitutionality, *see NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979), the relevant question becomes whether an interpretation of the statute is available that does not raise serious constitutional problems and "is not foreclosed either by the language of the [statutory] section or its legislative history." *DeBartolo*, 485 U.S. at 588.

Respondent does not challenge the elements of the *DeBartolo* doctrine. Instead, he attempts to avoid its force by blithely asserting that the doctrine does not apply where an interpretation of a statute "does not give rise to 'serious constitutional questions.'" Resp. Br. 32 n.35. For the reasons stated in petitioners State of New York *et al.*'s opening brief ("Pet. Br.") and those articulated by two courts of appeals, however, it is clear that the Secretary's regulations do pose a "significant risk", *Catholic Bishop*, 440 U.S. at 502, of interference with constitutional rights of free speech and privacy.¹ Consequently, this Court should ask not whether

¹ *See Massachusetts v. HHS*, 899 F.2d 53, 64-75 (1st Cir.) (*en banc*) (regulations violate constitutional rights of privacy and free speech), *petition for cert.*
(Footnote continued)

respondent's reinterpretation of Title X is reasonable, but whether the statutory language and legislative history of Title X clearly affirm that interpretation. Because Congress has not expressed an affirmative intention to bar counseling and referral for abortion and to isolate Title X clinics from programs where prohibited activities occur — and in fact has said otherwise, *see* Pet. Br. at 10-14, 26-31, — the challenged regulations are impermissible. Furthermore, respondent's suggestion that the policy of allowing counseling and referral for abortion does not represent a "fairly possible" construction of the statute, Resp. Br. 32 n. 35, citing *Califano v. Yamasaki*, 442 U.S. 682, 693 (1979), is hardly persuasive in light of the agency's application of such policy for the first 17 years of Title X's life.²

B. Even Under *Chevron*, § 59.8 Must Be Rejected As Contrary To The Intent Of Congress And As Arbitrary and Capricious

Respondent makes little effort to challenge the mass of statutory, legislative and administrative evidence presented in petitioners' opening brief, establishing that Congress did not intend 42 U.S.C. § 300a-6 ("section 1008") to bar counseling and referral for abortion from the scope of a Title X project. In support of § 59.8 of the regulations, respondent relies on a scant three pieces of evidence: the language of section 1008, one statement in the Conference Report, and an isolated remark of Representative Dingell during the floor debates on Title X. Resp. Br. 40. None of these comes close to demonstrating an "affirmative intention," *Catholic Bishop*, 440 U.S. at 501, of Congress to bar counseling and referral for abortions.

filed, 58 U.S.L.W. 3824 (U.S. June 26, 1990) (No. 89-1929); *Planned Parenthood Fed'n of Am. v. Sullivan* ("PPFA v. Sullivan"), No. 88-2251 (10th Cir. Sept. 6, 1990) (Exhibit A to Reply Brief for Petitioners Dr. Irving Rust *et al.*, *Rust v. Sullivan* (No. 89-1391) ("Rust Reply Brief") at A12-22) (same); *New York v. Sullivan*, 889 F.2d 401, 415-17 (2d Cir. 1989) (Kearse, J., dissenting) (same) (63-66a), *cert. granted*, 110 S. Ct. 2559 (1990); *see also West Virginia Ass'n of Community Health Centers, Inc. v. Sullivan*, 737 F. Supp. 929 (S.D. W. Va. 1990) (same as to portions of regulations), *appeal pending*, No. 90-2366 (4th Cir.).

² Even in the absence of the *DeBartolo* doctrine, the challenged regulations are not entitled to the degree of deference applied in *Chevron* for two reasons. First, this case involves a matter of pure statutory construction, which is an area of judicial, not administrative, expertise. *See Chevron*, 467 U.S. at 843 n.9; *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 446-48 (1987); *Cf. Marsh v. Oregon Natural Resources Council*, 109 S. Ct. 1851, 1860-61 (1989). Second, the Secretary's position in this matter of statutory construction reverses the longstanding agency position rendered contemporaneously with the enactment of Title X. *Cardoza-Fonseca*, 480 U.S. at 446-47 n.30.

Moreover, the Secretary's incomplete and misleading reading of each of these items should be rejected even under the standards of deference set forth in *Chevron*.

At the outset, it should be noted that respondent has attempted to divert attention from the subversiveness of § 59.8 by claiming that *petitioners* are seeking to alter longstanding agency policy. Resp. Br. 33-34 n.37, 40. Yet a review of the administrative record reveals that it is, in fact, respondent who has reversed his position.³ In 1981, as respondent admits, the Secretary *required* Title X projects to offer nondirective counseling and referral for abortion, specifically finding that such activities do not promote or encourage abortions as a method of family planning. Resp. Br. 41. The new regulations bar such counseling and referral. The 1982 General Accounting Office ("GAO") report expressly noted that prior Title X regulations *required* referrals to other medical facilities, including abortion providers, if medically indicated. (115JA). The new regulations bar such referrals except in an emergency. Resp. Br. 7 n.5. There simply is no room to debate that the challenged regulations represent a drastic change in policy, banning counseling and referral where they previously had been required.

1. Section 59.8 Is Contrary To The Plain Meaning Of Section 1008

Respondent contends that the language of section 1008 signifies a congressional intent to censor all speech about abortion from the doctor-patient relationships formed within Title X clinics. Resp. Br. 33-35. The unadorned words of section 1008, however, convey a prohibition only on funding of the method of abortion; they do not cover speech about the procedure.⁴

³ *See generally* Exhibit C to Brief for Petitioners Dr. Irving Rust *et al.*, *Rust v. Sullivan* (No. 89-1391); *see also Massachusetts v. HHS*, 899 F.2d at 62 ("The Secretary's position is untenable. We agree with both the court below and the district court in Colorado that the new regulations constitute a radical break from a prior consistent policy permitting nondirective counseling").

⁴ *See generally* Pet. Br. at 12-13. It is noteworthy that section 1008 does not extend the prohibition against funding the method of abortion to funding of abortion-related "services," although the words "method" and "services" elsewhere
(Footnote continued)

But even if section 1008 could reasonably be construed to include all forms of speech touching on the method of abortion, the regulation would nonetheless conflict with the clearly expressed intention of Congress to limit section 1008's application to abortions as "a method of family planning," *i.e.*, as a substitute for birth control. Section 59.8 would forbid Title X providers from giving information about abortion even to pregnant clients who are victims of rape or incest, who suffer from a medical condition that makes pregnancy dangerous for them, or who became pregnant as the result of the failure of a family planning device. In none of these circumstances, however, would health care workers or Title X clients be discussing abortion as a method of family planning.⁵ By ignoring the modifying phrase "as a method of family planning", § 59.8 does violence to the literal meaning of the words of section 1008.⁶

appear together in the statute. See 42 U.S.C. § 300(a) ("family planning projects . . . shall offer a broad range of acceptable and effective family planning methods and services") (3JA). See also *Dep't of the Treasury v. FLRA*, 110 S. Ct. 1623, 1629 (1990) ("A statute that in one section refers to 'law, rule or regulation' and in another section to only 'laws' cannot, unless we abandon all pretense at precise communication, be deemed to mean the same thing in both places.")

⁵ Indeed, the Secretary's view that all abortions are performed for the purpose of family planning betrays either total ignorance or an unfortunate callousness to the conditions that often cause women to consider having an abortion.

⁶ The legislative history of Title X underscores the Secretary's error in reading the phrase "as a method of family planning" out of section 1008. The Senate Report made clear the legislative desire to provide counseling and referral for non-funded medical care, and particularly for medical conditions detected within a Title X clinic: "[A] successful family planning program must contain the following components: (1) Medical services, including consultation, examination, prescription, and continuing supervision, supplies, instruction, and referral to other medical services as needed." S. Rep. No. 1004, 91st Cong., 2d Sess., *reprinted in* 116 Cong. Rec. 24,095-96 (1970). Depriving a woman whose pregnancy poses risks to her health of counseling about the nature of her condition and the option of pregnancy termination is obviously *not* what Congress intended.

⁷ Until 1988, HHS interpreted section 1008 in accordance with its plain meaning and the will of Congress. See Memorandum from HEW (July 25, 1979) (Attachment A to Amicus Brief for HHS, *Valley Family Planning v. North Dakota*, 661 F.2d 99 (8th Cir. 1981) (No. 80-1471)) ("we think that where such a referral [for abortion] is necessary because of medical indications, abortion is not being considered as a method of family planning at all but rather as a medical treatment possibly required by the patient's condition") (63JA); National Center for Family Planning Services, Health Services and Mental Health Administration, Dep't of HEW, *A Five-Year Plan for the Delivery of Family Planning Services* (Oct. 1971) ("1971

(Footnote continued)

2. The Legislative Record Confirms That § 59.8 Conflicts With The Intent Of Congress

Respondent's central justification for the counseling and referral ban is a statement in the Conference Report that "it is, and has been, the intent of both Houses that the funds authorized under this legislation be used *only* to support *preventive* family planning services . . ." Resp. Br. 35 (quoting, with emphasis added by respondent, H.R. Conf. Rep. No. 1667, 91st Cong., 2d Sess. 8-9, *reprinted in* 1970 U.S. Code Cong. & Admin. News 5081-82 ("Conf. Rep.")). Respondent reads this phrase to mean that a Title X program should not offer any services other than those "directed to . . . prevention of pregnancy." Resp. Br. 35. Consequently, according to respondent, Congress clearly indicated that a Title X program should not provide counseling and referral for abortion.

The unreasonableness of this position is demonstrated not only by the Conference Report itself, which specifically endorses the funding of "related medical, informational, and educational activities," but by the very regulation the Secretary now insists is necessary to carry out the will of the enacting Congress. Section 59.8(a)(2) *requires* the Title X provider to *refer* a pregnant client for prenatal care and to provide her with post-pregnancy counseling in the form of "information necessary to protect the health of mother and unborn child until such time as the referral appointment is kept." (3a). Yet if read in the manner advocated by respondent, section 1008 would prohibit the provision of counseling and referral for prenatal care as services not "directed to . . . prevention of pregnancy."

Five-Year Plan") ("[w]ithin the context of family planning service programs, abortions are not viewed as a method of fertility control, but as a service that should be available . . . only in the event of a human or contraceptive method failure") (42JA).

⁷ Respondent's purported belief that Congress wanted Title X programs to provide preventive family planning methods, and *nothing* else, finds no support in prior agency policy, which *required* Title X clinics to provide counseling and referral for non-funded medical care. In the 1971 Five-Year Plan, for example, the agency stated:

In addition to specific contraceptive services, programs should make available other related medical examinations and tests to assist in the early detection of illness and disease. While the program cannot provide full medical care because of its specialized nature, services should be provided for the screening and referral, including followup, of the patient to appropriate physicians, hospitals or other programs for necessary treatment. This mechanism is vital, given the fact that family planning is often the point of entry into a fragmented health care system for many individuals.

1971 Five-Year Plan at 41JA; see also Pet. Br. 20-22.

The only other evidence respondent presents is a phrase from the extended remarks of Representative Dingell reassuring Congress that through Title X "abortion is not to be encouraged or promoted in any way. . . ." Resp. Br. 36.⁸ Until the Secretary announced the regulations at issue here, the agency interpreted that remark to mean that Title X providers should not advocate abortion as a substitute for the use of birth control devices. See Memorandum from J. Mangel, Deputy Asst. General Counsel, HEW, to L. Hellman, M.D., Deputy Asst. Sec'y for Population Affairs (Jan. 18, 1973) (45-48JA). Representative Dingell has confirmed that this obvious interpretation of his statement is the correct one. Letter from J. Dingell to O. Bowen (Oct. 14, 1987) (137-39 JA). Thus, while this remark may conceivably provide some basis for a ban on promoting or encouraging abortion as a method of family planning, it cannot possibly support a total prohibition on the provision of neutral, factual information about abortion.

The Secretary's justification for refashioning section 1008 is the notion that offering neutral, truthful information about abortion constitutes "encouragement" of abortion. 53 Fed. Reg. 2922, 2933 (1988); Resp. Br. 40. Yet Congress emphatically rejected the premise that the provision of nondirective information constitutes "encouragement" or "promotion." Members

⁸ Respondent goes on to chide petitioners for "rely[ing] most heavily on Title X's 'subsequent' legislative history." Resp. Br. 37. On the contrary, petitioners submit that the subsequent legislative history simply parallels the plain language, the contemporaneous legislative history and the record of administrative enforcement of section 1008. Moreover, respondent misstates the law when he contends that reauthorizations, unlike reenactments, are not probative of congressional intent. In fact, reauthorizations are reenactments, and can serve as strong evidence of congressional intent when Congress is aware of an agency's interpretation of the statute and reauthorizes the statute without change. *Grove City College v. Bell*, 465 U.S. 555, 568-69 n.19 (1984). Also, respondent's reliance on *TVA v. Hill*, 437 U.S. 153 (1978), is misplaced. Resp. Br. 37. In *TVA*, petitioner sought to use appropriations by Congress and statements of members of an appropriations committee that conflicted with the plain meaning of the Endangered Species Act as evidence that Congress had repealed that Act by implication. Under those circumstances, the Court declined to find a repeal, especially where there was no evidence that Congress as a whole was aware of the inconsistency. Petitioners in this case do not contend that subsequent acts of Congress and statements of members of Congress repealed Title X. Rather, we contend that the reauthorization of Title X and the incorporation of agency policy into the accompanying committee reports demonstrate that the agency's construction of the statute "accurately reflect[ed] congressional intent." *Grove City*, 465 U.S. at 568.

of Congress repeatedly stressed that the very purpose of Title X was to enable "all individuals . . . to have the opportunity, within the dictates of their conscience, to exert control over their own life destinies." 116 Cong. Rec. 24,092 (1970) (statement of Sen. Eagleton). Title X itself provides that "[t]he acceptance by any individual of family planning services . . . shall be voluntary." 42 U.S.C. § 300a-5 (1982) (10JA). Congress sought to facilitate this voluntary action by providing accurate, comprehensive information.⁹ By withholding relevant information from Title X beneficiaries, the Secretary prevents them from making the informed, voluntary family planning decisions that Congress intended to facilitate.

3. Section 59.8 Is Arbitrary and Capricious

In any event, the counseling and referral ban must be rejected because it is arbitrary and capricious. Even respondent admits that a "revision" in policy must be rationally connected to the "facts found and the choice made". Resp. Br. 41-42, citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Insur. Co.*, 463 U.S. 29 (1983). But respondent fails to cite any "facts" to sustain the conclusion that nondirective counseling or referral "promote" or "encourage" abortion as a method of family planning. Resp. Br. 41-42. Indeed, despite his best efforts, Resp. Br. 5, respondent's citation of the reports of the GAO and Office of the Inspector General ("OIG") simply do not support this conclusion. The GAO Report recommended that HHS incorporate into the Title X regulations HHS' position, as expressed in legal memoranda, that Title X *requires* nondirective counseling and referral. (121JA). The GAO Report expressly found that clinics were generally aware of HHS' legal opinions (86JA), that no women were "encouraged" to have abortions, *id.*, and that no Title X funds had been used to "advise clients to have abortions". (82, 84, 106JA). Respondent cannot rationally use a 1982 GAO Report finding that women were not "encouraged" to have abortions under HHS' prior policy as the factual predicate for the opposite conclusion five years later.¹⁰

⁹ See, e.g., 116 Cong. Rec. 37,388 (1970) (statement of Rep. Burke) (purpose of Title X is "to provide information, including educational materials . . . to enable people to do what their conscience dictates is proper or advisable in their own situation."); *id.* at 37,382 (statement of Rep. Rogers); *id.* at 37,375 (statement of Rep. Eroyhill).

¹⁰ Respondent also claims that the new regulations are necessary to "prevent program abuses" identified in the GAO and OIG Reports. Resp. Br. 42. This argument does (Footnote continued)

C. Even Under *Chevron*, § 59.9 Must Be Rejected As Contrary to the Intent of Congress And As Arbitrary and Capricious

Just as respondent claims that the ban on abortion counseling and referral is consistent with past agency regulations, so respondent also argues that the requirement of physical and financial separation of Title X projects from activities prohibited by the new regulations merely clarifies longstanding administrative policy.¹² Resp. Br. 43-44 & n.49. From the beginning, however, HHS sought to effectuate Congress' intent to integrate the Title X program into the broader health care system, recognizing that in many cases this would mean sharing some facilities. See, e.g., Memorandum from J. Mangel, Deputy Asst. General Counsel, HEW, to L. Hellman, M.D., Deputy Asst. Sec'y for Population Affairs (Apr. 20, 1971) (39JA). Consequently, prior policy regarding separation had permitted the sharing of facilities, staff, and overhead costs, so long as the program was otherwise separate and distinct. See GAO Report (84-85JA).

Respondent's only argument in support of § 59.9 — that the regulation is "obviously" permissible because its purpose is to "avoid creating the appearance that the government is supporting unauthorized activities," Resp. Br. 43, — is equally misguided. Although the 1982 GAO Report speculated that there was a possibility of public confusion over whether federal funds were being used for abortion, it concluded that there was *no evidence* that Title X funds had in fact been so used. (106JA). The Secretary therefore cannot base his allegation that Title X grantees "frequently failed" to observe separation requirements, or had failed to "act

not withstand scrutiny. The GAO Report in no way supports the proposition that a radical change in HHS' policy was necessary to remedy what the GAO termed "questionable" practices, none of which resulted in "encouraging" or "advising" women to have abortions. (84-86JA). Indeed, the GAO Report, rather than recommending a *change* in policy, noted that *formalizing* HHS' policy would facilitate monitoring for compliance. (119JA).

Moreover, while the anecdotal testimony referred to by the Secretary, Resp. Br. 5, might justify an investigation of whether a recipient has violated the rule requiring nondirective counseling, it does not support repeal of that rule.

¹² If this were true, the Title X facilities presently co-located with abortion clinics, estimated by HHS in 1982 to be about 74 in number, see GAO Report (85JA), would have been out of compliance with the prior regulation, which was clearly not the case. *Id.* Indeed, 42 C.F.R. § 59.5(b)(8) (1986) required "coordination and use of referral arrangements with other providers of health care services." (28JA).

with scrupulous regard for the requirements of law," on that report. Resp. Br. 44-45 (citing *Heckler v. Community Health Services*, 467 U.S. 51, 63 (1984)).¹³ Moreover, the Secretary's scattershot approach to remedying a potential misimpression — requiring separate entrances, exits, addresses and personnel — is not a rational response to the alleged problem.¹⁴

Finally, respondent apparently has no reply to the holdings of the two courts of appeals that struck down § 59.9 on the grounds that it impermissibly conflicts with the mandate of Congress in enacting Title X. See *Massachusetts v. HHS*, 899 F.2d at 59-60; *PPFA v. Sullivan*, Exhibit A to Rust Reply Brief at A11-12. As those courts found, § 59.9 fails to heed Congress' express admonishment that section 1008 not "interfere with or limit programs . . . supported by funds other than those authorized under this legislation." Conf. Rep. at 5082. Moreover, the regulation defeats the statutory goal of integrating Title X clinics into the general health care system. See 42 U.S.C. § 300a(a) (1982) (requiring State health authorities to submit a "State plan for a coordinated and comprehensive program of family planning services") (4JA). Furthermore, the regulation obstructs the legislative goal of making family planning services "readily available to all persons desiring such services." 42 U.S.C.A. § 300 historical note (West 1982) (70-71a). See generally Pet. Br. 26-30.

By favoring segregation over integration and "program integrity" over program accessibility, § 59.9 fundamentally distorts the language and purpose of Title X. Thus, even assuming the Secretary has broad "authority to promulgate regulations that are 'reasonably related to the purposes of the enabling legislation,'" Resp. Br. 43 (quoting *Mourning v. Family Publication Service, Inc.*, 411 U.S. 356, 369 (1973)), § 59.9 must be rejected as an impermissible subversion of those purposes.

¹³ Nor can "testimony from private individuals," Resp. Br. 44, alleging that certain Title X recipients violated agency regulations provide a rational basis for repealing the regulations, rather than simply enforcing or clarifying them.

¹⁴ One way of remedying the alleged misimpression would be for Title X clinics to post signs stating that the co-siting of Title X clinics with clinics providing abortions is not an indication that the government sanctions such activities.

II. THE REGULATIONS CONTRAVENE FREE SPEECH GUARANTEES

A. The Counseling And Referral Restrictions Are Impermissibly Viewpoint-Based

The regulations' ban on abortion counseling and referral does not simply reflect a policy choice to fund only pre-pregnancy family planning services, as the Secretary now argues. Resp. Br. 20. It is an attempt to control the content of the informed consent dialogue so that pregnant women will not hear about abortion and thus be less likely to choose it. The distinction drawn by the regulations between two types of medical information exchanged during counseling is indisputably viewpoint-based: speech supporting childbirth is mandated while speech deemed to "promote or encourage" abortion is forbidden. While it is true that the government has no affirmative obligation to fund the exercise of constitutional rights, even speech, it is equally well-established that the government may not use the power of the purse to squelch the expression of ideas with which it disagrees.

The speech restrictions contained in the regulations cast a "pall of orthodoxy" over the counseling process, *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967), — an outcome deeply at odds with the values underlying the First Amendment. See, e.g., *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). What the Secretary plainly wants to do is suppress the "dangerous idea" that women can choose abortion. Cf. *Regan v. Taxation With Representation*, 461 U.S. 540, 548 (1983) (citations omitted). So plain is the intent of the regulations that respondent barely bothers to deny they are viewpoint-based. Resp. Br. 23 n.21.¹⁴

In any context, governmental funding decisions motivated by the desire to suppress speech would be troubling, but where the government seeks to intervene in a medical dialogue of great sensitivity, the abuse of power is even more egregious. The relationship between the pregnant woman and her physician or counselor is at bottom one of trust and dependence. She must be able to rely upon the advice given her so that she can make an informed choice. The pregnant

¹⁴ Two of the three courts of appeals considering these regulations did not hesitate to characterize them as viewpoint-based. See *Mass. v. HHS*, 899 F.2d at 73 (the regulations "slant the content of the relevant counseling in an 'antiabortion' direction"); *PPFA v. Sullivan*, Exhibit A to Rust Reply Brief at A15 (relying upon *New York v. Sullivan*, 889 F.2d at 416 (Kearse, J., dissenting)).

woman is in essence a "captive audience", *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302 (1974) (citation omitted), peculiarly vulnerable to suggestion or coercion. There are no decisions more fraught with consequences than those necessitated by an unexpected pregnancy; and the fact that the choice is often made under stressful circumstances make it crucial that the integrity of the counseling relationship be preserved.¹⁵

The nature of the population served by Title X renders the government's intrusion into the counseling process all the more reprehensible. Title X patients, disproportionately young and minority, typically cannot afford to go elsewhere for reproductive health care; the counseling they receive at federally subsidized clinics may well be the only counseling they will get. As far as Title X patients are concerned, the restrictions amount to a near-total suppression of abortion-related speech, the predictable effect of which will be uninformed decisionmaking. As the concurring judge below noted, the regulations are "[c]raft[ed] . . . in [a] fashion [that] constitutes a trap for the mostly unsophisticated and unwary patients". 889 F.2d at 415 (Cardamone, J., concurring) (61a). Viewing the government's mandated pro-childbirth speech as merely one side of an argument which will be offset by speech elsewhere, Resp. Br. 28-29, thus ignores reality. For poor women, the federal government holds a virtual monopoly in the field of family planning. *PPFA v. Sullivan*, Exhibit A to Rust Reply Brief at A16.

While the government certainly has a right to participate in public debate, Resp. Br. 22, 28, this is not a case where the federal government's voice is one among many. It may well be, for example, that the government could legitimately choose to subsidize a series of billboards to be displayed on highways extolling the virtues of childbirth without incurring an obligation to present the case for abortion. But here, the Secretary aspires to control speech in a very particularized forum — where the intended audience is an individual who is especially reliant on the information she receives,

¹⁵ This Court has recognized the potentially coercive nature of the one-to-one counseling relationship between lawyer and client, a relationship arguably less fraught with momentous consequences for the counselee than the doctor-patient relationship. See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 641-42 (1985).

needs to make a decision quickly, and is unlikely to seek additional information elsewhere.¹⁶

This is a situation utterly unlike that presented in *Block v. Meese*, 793 F.2d 1303 (D.C. Cir.), *cert. denied*, 478 U.S. 1021 (1986), where the federal government sought to have labelled as "propaganda" certain films produced in foreign countries. The labelling did not silence 'opposing' speech in any way; rather it was a means by which the government could communicate its view of the ideas expressed in the films. Moreover, the film audience was in no sense a "captive" one. By the same token, respondent's analogizing of the regulations to the government's production of a television program on preventive family planning, Resp. Br. 25, 27-28, is misconceived. Subsidizing such a program by itself implies no suppression of other programs expressing an opposing view, since the relevant forum for the expression of differing viewpoints is much broader than in the tightly-focused counseling context. Nor is the television viewing audience in any way compelled to sit through the government's programming, since no special reliance is likely to be placed by any individual member of the audience on the information conveyed. Finally, unlike in the counseling context, the First Amendment rights of the audience can be fully vindicated by communication from other parties at other times.

B. The Regulations Impermissibly Burden Independently Funded Speech

The physical separation requirement of § 59.9 and the definition in § 59.2 of "project funds" to include "grant funds, grant-related income or matching funds" also contravene the First Amendment by burdening Title X recipients' independently-funded speech activities. Respondent does not deny that these strictures will hinder, if not prevent, non-Title X-funded expression, merely asserting that the receipt of federal monies carries with it

¹⁶ The Secretary's claim that the regulations merely vindicate the government's right to participate in the marketplace of ideas betrays a disturbing insensitivity to the nature of the services rendered under the Title X program. Any governmental attempt to propagandize through counseling and referral is antithetical to the essence of the Title X mission: to provide medical services for poor women in accordance with accepted professional standards and ethics. See generally Brief of *Amici Curiae* American College of Obstetricians and Gynecologists *et al.* ("ACOG *Amici* Brief"); *PPFA v. Sullivan*, Exhibit A to Rust Reply Brief at A20-22.

the obligation to comply with federal policy directives. Resp. Br. 30-31. While it is true that a recipient of federal largesse should not be allowed to subvert the purposes of the program under which it is funded, it is equally true that it may not be compelled to forfeit constitutionally protected activities it performs with non-federal funds. Unlike the program at issue in *South Dakota v. Dole*, 483 U.S. 203 (1987), where the conditions attached to the receipt of federal highway funds did not require states to engage in unconstitutional activities, *id.* at 210-11, the receipt of federal monies in this case requires clinics to forfeit the exercise of their independently-funded speech activities within the confines of the Title X project. Nor does the situation at bar resemble that of *Buckley v. Valeo*, 424 U.S. 1 (1976), where this Court upheld limits on private expenditures as a condition for the receipt of federal campaign funds, *id.* at 57 n.65, 90-93, since the underlying purpose of the *Buckley* restrictions was "not to abridge, restrict, or censor speech, but rather to use public money to facilitate and enlarge public discussion and participation in the electoral process, goals vital to a self-governing people." *Id.* at 92-93. Here, the goal of the Secretary's regulations is quite the opposite.

III. THE REGULATIONS VIOLATE CONSTITUTIONAL PRIVACY GUARANTEES

It blinks at reality to suggest that the ban on abortion counseling and referral will have no detrimental impact on Title X patients' ability to make informed decisions. Resp. Br. 14. Censoring the speech of health professionals within what should be a free and frank exchange of information will irreparably damage the trust and reliance necessary to the counseling relationship. Some women will mistakenly interpret their counselors' silence about abortion to mean that it is not an available option or that for some reason the counselor thinks it is not appropriate for them. Even those women knowledgeable enough to see beyond the scripted advice will be delayed in getting the kind of counseling they are entitled to under generally accepted standards of medical care; the regulations mandate a deliberately obfuscated referral list which may not contain the names of those providers performing the vast majority of abortions. Moreover, many near-poor women who have paid a fee based on a sliding scale will have used their scarce resources to pay for substandard medical care and be delayed in going

elsewhere. Thus, these regulations place the woman in a worse spot than she would have been absent any Title X program.¹⁷

The distortion of the counseling process mandated by the regulations is not alleviated by the posting of a disclaimer, as respondent suggests. Resp. Br. 15 & n.10. There are many situations where even a warning prominently displayed by the clinics to the effect that abortion is not discussed would not adequately safeguard the woman's ability to make an informed decision. For instance, a woman with an underlying medical condition rendering continuation of a pregnancy hazardous to her health might be unaware of the ramifications of her condition and unable to discern from what her counselor tells her that abortion is an option she should consider. In fact, the only women who will be helped by such a disclaimer are those who know when they enter the clinic that they want an abortion. More fundamentally, the restrictions placed on the health professional make it impossible to have the kind of exchange necessary for true informed consent to take place. The counseling process is an organic one which changes shape from patient to patient, adapting itself to the individual's needs. Declaring an entire topic off-limits, when ordinarily it would be discussed, fundamentally alters the nature and purpose of the entire communication. However the resulting dialogue is characterized, it is no longer informed consent counseling as defined under accepted standards of medical practice. See ACOG Amici Brief at 4-9; Brief of Amici Curiae American Public Health Ass'n *et al.* at 16-20.

¹⁷ The majority below acknowledged that the regulations "may hamper or impede women in exercising their right of privacy in seeking abortions", 889 F.2d at 411 (55a), a self-evident fact which respondent refuses to recognize. See also *Mass. v. HHS*, 899 F.2d at 69-70; *PPFA v. Sullivan*, Exhibit A to Rust Reply Brief at A16.

CONCLUSION

For the above reasons and the additional reasons stated in our opening brief, petitioners respectfully ask this Court to reverse the decision of the Court of Appeals for the Second Circuit.

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Respectfully submitted,

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